Supreme Court, U.S.
FILED
SEP 5 1990
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(2)

No. 90-240

In The

Supreme Court of the United States

October Term, 1990

JAMES L. POLK AND MATTIE B. POLK,

Petitioners,

v.

DIXIE INSURANCE COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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September 4, 1990

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QUESTIONS PRESENTED

In *Batson v. Kentucky*, 476 U.S. 79 (1986), this Court held that the equal protection clause of the Fourteenth Amendment prohibits the prosecutor in a state criminal case from exercising peremptory challenges for racially discriminatory reasons to remove members of the defendant's race from the venire.

By federal statute, 28 U.S.C. § 1870, each party in a civil case is entitled to three (3) peremptory challenges to prospective jurors. Exercising that right at the trial of this diversity civil case in the district court below, respondent Dixie Insurance Co. (Dixie) made peremptory challenges to three (3) prospective jurors: one white and two blacks. III R. 30-31.

At the conclusion of the peremptory challenge conference with the district court and without citing any authority, petitioners James L. and Mattie B. Polk (the Polks), who are black, moved the district court to require Dixie to state some reason in the record for exercising the peremptory challenges on the only two black jurors that were tendered to Dixie. Without asking for a response by Dixie, the district court promptly denied the motion by stating: "All right. That motion will be denied, *the Government not being involved in this case.*" III R. 30-31 (emphasis added); Pet. 3. The Polks did *not* argue to the district court that the district court's participation in the jury selection process supplied the requisite governmental action. This case was then tried to the jury resulting in a verdict for Dixie. The district court entered judgment in favor of Dixie.

QUESTIONS PRESENTED – Continued

The Polks appealed to the United States Court of Appeals for the Fifth Circuit and argued that the district court erred in denying their motion. The Fifth Circuit summarily affirmed the district court on this point, stating that it was bound by its en banc decision in *Edmondson v. Leesville Concrete Co.*, 895 F.2d 218 (5th Cir. 1990), which held that *Batson* does not apply to a civil suit between private parties. *Polk v. Dixie Insurance Co.*, 897 F.2d 1346, 1347 (5th Cir. 1990).

The questions presented are:

1. Whether the petitioners properly raised and preserved for review their *Batson* claim by failing to argue to the district court that it was the district court's participation in the jury selection process which supplied the requisite governmental action.

2. If the answer to question 1 is yes, whether the exercise of peremptory challenges to prospective jurors by a private litigant in a civil case in federal district court constitutes governmental action within the meaning of the Fifth Amendment of the United States Constitution.

3. If the answer to question 2 is yes, whether the rule of *Batson v. Kentucky*, 476 U.S. 79 (1986), should be extended to civil cases between private parties.

LIST OF PARTIES AND RULE 29.1 LIST

The parties to the proceedings below were the petitioners James L. Polk and Mattie B. Polk and the respondent, Dixie Insurance Co.

The Senatobia Bank, the lienholder on Mr. Polk's Cadillac automobile, was a defendant in the district court but was dismissed by stipulation of dismissal with prejudice on February 17, 1988.

Pursuant to Rule 29.1, Dixie Insurance Co. lists its parent corporations and subsidiary corporations (excluding wholly owned subsidiaries):

Dixie Insurance Company is a wholly-owned subsidiary of Stonewall Insurance Company; Stonewall Insurance Company, in turn, is a wholly-owned subsidiary of Great American Insurance Company; Great American Insurance Company, in turn, is a wholly-owned subsidiary of Great American Holding Corporation; Great American Holding Corporation, in turn, is a wholly-owned subsidiary of American Financial Corporation, the ultimate parent.

The following is a list of subsidiaries partially owned by American Financial Corporation:

The Charter Company
Chiquita Brands International, Inc.
(and subsidiaries)
Nordstrom Management Services, Ltd.
Transportation Indemnity, Ltd.
Nordstrom Agency of Houston, Inc.
American Business Insurance, Inc.

LIST OF PARTIES AND RULE 29.1 LIST – Continued

American Business Insurance Agency of Texas, Inc.
Frederick Rauh & Company
American Financial Enterprises, Inc.
The Pen Central Corporation
Detroit Manufacturers Railroad Company
The New York and Harlem Railroad Company
The Ann Arbor Railroad Company
D.I.Industries
Carol Cable Company Limited
Multiway Industries (H.K.) Limited
Holden Energy Corporation
Pennsylvania-Reading Seashore Lines
Pittsburgh and Cross Creek Railroad Company
Sprague Technologies, Inc. (and subsidiaries)
Brothers Property Corporation
Great American Communications Company
Spelling Entertainment, Inc.
Ocean Reef Club, Inc.
Great American Lloyd's Insurance Company
Casualty Underwriter's, Inc.
Hallmark General Insurance Agency
National Interstate Corporation
National Interstate Insurance Agency of Texas, Inc.
Boca Grande Club, Inc.
Transport Insurance Agency, Inc.
Mission Insurance Group, Inc. (and subsidiaries)

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Petitioners,

v.

DIXIE INSURANCE COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Dixie Insurance Company [Dixie] respectfully requests that this Court deny the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The April 11, 1990, Opinion of the United States Court of Appeals for the Fifth Circuit is officially

reported at *Polk v. Dixie Insurance Co.*, 897 F.2d 1346 (5th Cir. 1990). It is attached as an Appendix to the Petition.

JURISDICTION

The district court's subject matter jurisdiction was based upon complete diversity of citizenship between the parties, satisfaction of the amount in controversy requirement, 28 U.S.C. § 1332, and a timely removal of this action on February 25, 1987 from the Circuit Court of Marshall County, Mississippi, where it was filed originally on January 26, 1987. 28 U.S.C. § 1441.

The court of appeals had appellate jurisdiction pursuant to 28 U.S.C. § 1291 of the Polks' appeal from the district court's final judgment, which was entered on September 19, 1988, II R. 491-92. The Polks' notice of appeal to the Fifth Circuit was timely filed on October 4, 1988, II R. 497, within 30 days of entry of the district court's final judgment, *see* F.R.A.P. 4(a).

Where a petition for certiorari is filed with this Court within 90 days of the judgment of a court of appeals, 28 U.S.C. § 2101(c), Rule 13, this Court has jurisdiction to review decisions of the courts of appeals by writ of certiorari under 28 U.S.C. § 1254. The Fifth Circuit's opinion below was entered on April 11, 1990. On July 9, 1990, the petitioners filed a petition for writ of certiorari which did not comply with the printing requirements of the rules of this Court. By letter dated July 12, 1990, the Clerk of Court advised the petitioners' attorney that the petition must be corrected and that upon receipt of a corrected petition it would be filed as of the date of the

original petition. The corrected petition was received by the Clerk on August 6, 1990.

STATEMENT OF THE CASE

The Statement of the Case found at pages 2-5 of the petition must be supplemented.

In ruling on the petitioners' motion that Dixie be required to state nonracial reasons for exercising peremptory challenges to the two black jurors tendered to it, the district court stated:

> All right. That motion will be denied, *the Government not being involved in this case.*

III R. 30-31 (emphasis added); Pet. 3.[1]

The petitioners' counsel did not raise before the district court the question of whether the district court's role in the jury selection process supplied the requisite governmental action to make the Fifth Amendment applicable to Dixie's exercise of its peremptory challenges.

[1] Because of the district court's speedy ruling on the motion, Dixie was unable to respond to the motion, and its reasons for exercising the two questioned peremptory challenges are not of record. Dixie denies that the challenges were made for racially discriminatory reasons.

SUMMARY OF ARGUMENT FOR DENYING THE PETITION

When petitioners' counsel began to make his *Batson* motion to the district Court, the district court stated:

> You understand that the government is not involved in this case?

III R. 30; Pet. 3. Petitioners' counsel responded: "Yes, sir, I do . . . " and proceeded to make his motion. After the motion was made and before Dixie's counsel could respond, the district court stated:

> All right. That motion will be denied, *the Government not being involved in this case.*

III R. 31 (emphasis added); Pet. 3. Petitioners did not present to the district court their argument here that the trial judge's participation in the jury selection process supplied the required governmental action.

The district court clearly based its ruling on the fact that the government was not involved in the case and that, therefore, no governmental action was present to make *Batson* applicable.

It is elementary that this Court does not ordinarily review questions which were not properly raised below and preserved for review. *United States v. Mendenhall*, 446 U.S. 544, 551-52 n.5 (1980); *Youakim v. Miller*, 425 U.S. 231, 234 (1976). This rule has the obvious purposes of allowing the court below first to address the issue and for this Court to have the benefit of the lower court's reasoning. Here, the district court obviously based its ruling on the fact that the government was not a litigant in the case, and the petitioners did not present to the district court their argument advanced in the petition that it was the

district court's participation which supplied the required governmental action. Thus, the petitioners did not properly raise the governmental action issue in the district court, and the petition should be properly denied for that reason alone.

There is no conflict between the circuits or state courts of last resort requiring the granting of certiorari in this case. Petitioners argue that certiorari should be granted because the Fifth Circuit's decision conflicts with the decisions of the Eighth and Eleventh Circuits in *Fludd v. Dykes*, 863 F.2d 822 (11th Cir.), *cert. denied sub nom. Tiller v. Fludd*, 110 S. Ct. 201 (1989), and *Reynolds v. City of Little Rock*, 893 F.2d 1004 (8th Cir. 1989), *pet. for cert. filed sub nom. City of Little Rock v. Reynolds*, 59 U.S.L.W. 3053 (U.S. June 25, 1990) (No. 90-1). Petitioners also argue that the Fifth Circuit's decision conflicts with decisions by the state appellate courts of Florida, *City of Miami v. Cornett*, 463 So. 2d 399 (Fla. 3d D.C.A. 1985), and California, *Holley v. J & S Sweeping Co.*, 143 Cal. App. 3d 588, 192 Cal. Reptr. 74, 77-78 (Cal. 1st Ct. App. 1983). Pet. 6-7. However, properly understood, those decisions do not create a conflict with the Fifth Circuit sufficient to warrant review by this Court.

In *Reynolds* the Eighth Circuit held that *Batson* applies to the conduct of a governmental litigant in a civil trial, specifically governing its exercise of peremptory challenges. 893 F.2d at 1005. However, the Eighth Circuit explicitly stated that it expressed "no view on whether the action of the court alone, in a case involving no governmental litigants, can supply the necessary element of governmental action." *Id.* at 1008. In *Edmondson* the Fifth Circuit stated that it had "no occasion to consider

the situation presented where the state appears as a civil litigant." 895 F.2d at 222 n.18. Thus, *Reynolds* does not conflict with the Fifth Circuit's holding on the nonapplicability of *Batson* because of the lack of governmental action.

In *Fludd v. Dykes*, the Eleventh Circuit did hold that *Batson* applied in civil as well as criminal cases and specifically that the exercise of peremptory challenges by governmental litigants in a civil action were subject to the constraints of *Batson*. The court, in dicta, ruled that the actions of the trial judge supplied the requisite governmental action. 863 F.2d at 828. This discussion is clearly dicta because the court was considering the exercise of peremptory challenges by *governmental official* litigants. Therefore, the governmental action issue in *Fludd* should have properly been resolved as it was in *Reynolds* on that fact alone.

The state court decisions upon which petitioners rely do not warrant the exercise of certiorari jurisdiction by this Court because the state courts are not "state courts of last resort" as specified by Rule 10.1(a). In any event, both decisions are plainly distinguishable. *Cornett* was based exclusively on the Florida constitution, involved the exercise of peremptory challenges by a governmental litigant, the City of Miami, and did not analyze the governmental action issue. *Holley* was based on the California constitution and contained no state action analysis.

Finally, to the extent that the *Fludd v. Dykes* dicta on the state action issue conflicts with the Fifth Circuit's decision here, Dixie respectfully suggests that the Court should allow this issue to reach decisions in other courts

of appeals so that this Court will have the benefit of more than just two analyses of this issue.

The Fifth Circuit's decision is consistent with this Court's precedents on determining governmental action. Petitioners argue that the Fifth Circuit's decision misapplied this Court's opinion in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), and is inconsistent with *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961); *Terry v. Adams*, 345 U.S. 461 (1953); and *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970). Pet. 7-12. A careful review of the Fifth Circuit's decision in *Edmondson* and this Court's precedents reveals that *Edmondson* is fully consistent with those precedents.

This Court has stated that generalities cannot control this determination of governmental action, and the outcome of each case depends upon its particular facts and circumstances. *Burton*, 365 U.S. at 722.

The Fifth Circuit explicitly acknowledged and applied *Lugar*'s two-part test for identifying governmental action, 457 U.S. at 937. *Edmondson*, 895 F.2d at 221. The Fifth Circuit concluded that the first part was met because the exercise of a peremptory challenge was authorized by a federal statute. 895 F.2d at 221. However, the Fifth Circuit correctly concluded that there was no state actor causing the deprivation.

Petitioners argue that the holding in *Lugar*, that the actions of the state court clerk in approving the writ under the unconstitutional state prejudgment attachment statute, applies to the trial judge here. This is plainly wrong because the Court in *Lugar* noted that its holding was "limited to the particular context of prejudgment

attachment." 457 U.S. at 939 n.21. *Lugar* does not compel a holding that the trial judge here supplied the requisite governmental action to a private party's exercise of peremptory challenges. To do so would be inconsistent with this Court's observations in *Blum v. Yaretsky*, 457 U.S. 991, 1004-05 (1982), that "a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed that of the State[ ]" and that "[m]ere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives under the terms of the Fourteenth Amendment." As the en banc Fifth Circuit correctly observed: "The merely ministerial function exercised by the judge simply in permitting the venire members cut by counsel to depart is an action so minimal in nature that one of less significance can scarcely be imagined." 895 F.2d at 221 (footnote omitted).

The Fifth Circuit also noted, 895 F.2d at 222, that it was hard to see how this Court could have reserved judgment, as it purported to do in *Batson*, on the strikes by defense counsel, if the "actor" was the judge. 476 U.S. at 89 n.12.

Burton v. Wilmington Parking Authority is distinguishable on its facts because of the extensive symbiotic relationship there between the private restaurant engaged in racial discrimination and its landlord, a state parking authority, and the fact that the state parking authority was receiving benefits from the restaurant. *See NCAA v. Tarkanian*, 488 U.S. 179, 196 n.16 (1988) (distinguishing

Burton based on the interdependence between the restaurant and the parking authority.)

Terry v. Adams is distinguishable because the Jaybird primary was an integral part of the county election process. As correctly observed by the Fifth Circuit, "The traditional roles of private counsel and the state have remained discrete in this case." 895 F.2d at 222. Likewise, *Adickes* is completely distinguishable on its facts because there both state law and custom coerced and encouraged racial segregation in the use of public restaurants. Here, there is no comparable federal action coercing or significantly encouraging racial discrimination in the exercise of peremptory challenges by private parties in civil cases in federal court.

As the Fifth Circuit also correctly noted, 895 F.2d at 222, the actions of private counsel cannot supply the requisite state action. In *Polk County v. Dodson*, 454 U.S. 312, 325 (1981), this Court held that a public defender, paid by the state, is not a state actor when performing a lawyer's traditional function as counsel to a defendant in a criminal proceeding.

ARGUMENT FOR DENYING THE PETITION

I. The petitioners failed to raise properly the Fifth Amendment governmental action issue before the district court.

As noted above, this case presents two substantive questions for review: (1) Whether the exercise of peremptory challenges by a private litigant in a civil case in federal district court constitutes governmental action within the meaning of the Fifth Amendment and, if so, (2)

whether the rule of *Batson v. Kentucky*, 476 U.S. 79 (1986), should be extended to civil cases between private litigants.

When petitioners' counsel began to make his *Batson* motion, the district court stated:

> You understand that the government is not involved in this case?

III R. 30; Pet. 3. Petitioners' counsel responded: "Yes, sir, I do . . . " and proceeded to make his motion. After the motion was made and before Dixie's counsel could respond, the district court stated:

> All right. That motion will be denied, *the Government not being involved in this case.*

III R. 31 (emphasis added); Pet. 3.

The district court clearly based its ruling on the fact that the government was not involved in the case and that, therefore, no governmental action was present to make applicable the *Batson* rule. Petitioners' counsel failed to raise squarely the governmental action issue with the district court.

It is elementary that this Court does not ordinarily review questions which were not properly raised below and preserved for review. *United States v. Mendenhall*, 446 U.S. 544, 551-52 n.5 (1980); *Youakim v. Miller*, 425 U.S. 231, 234 (1976). This rule has the obvious purposes of allowing the court below first to address the issue and for this Court to have the benefit of the lower court's reasoning. Here, the district court obviously based its ruling on the fact that the government was not a litigant in the case, and the petitioners did not present to the district court

their argument advanced in the petition that it was the *district court's participation* which supplied the required governmental action. Thus, the petitioners did not properly raise the governmental action issue in the district court, and the petition should be properly denied for that reason alone.

II. There is no conflict among the circuits or state courts of last resort requiring the granting of certiorari in this case.

Petitioners argue that certiorari should be granted because the Fifth Circuit's decision conflicts with the decisions of the Eighth and Eleventh Circuits in *Fludd v. Dykes*, 863 F.2d 822 (11th Cir.), *cert. denied sub nom. Tiller v. Fludd*, 110 S. Ct. 201 (1989), and *Reynolds v. City of Little Rock*, 893 F.2d 1004 (8th Cir. 1989), *pet. for cert. filed sub nom. City of Little Rock v. Reynolds*, 59 U.S.L.W. 3053 (U.S. June 25, 1990) (No. 90-1). Petitioners also argue that the Fifth Circuit's decision conflicts with decisions by the state appellate courts of Florida, *City of Miami v. Cornett*, 463 So. 2d 399 (Fla. 3d D.C.A. 1985), and California, *Holley v. J & S Sweeping Co.*, 143 Cal. App. 3d 588, 192 Cal. Reptr. 74, 77-78 (Cal. 1st Ct. App. 1983). Pet. 6-7. However, properly understood, those decisions do not create a conflict with the Fifth Circuit sufficient to warrant review by this Court.

In *Reynolds* the Eighth Circuit held that *Batson* applies to the conduct of a *governmental* litigant in a civil trial, specifically governing its exercise of peremptory challenges. 893 F.2d at 1005. However, the Eighth Circuit explicitly stated that it expressed "no view on whether

the action of the court alone, in a case involving no governmental litigants, can supply the necessary element of governmental action." *Id.* at 1008. In *Edmondson* the Fifth Circuit stated that it had "no occasion to consider the situation presented where the state appears as a civil litigant." 895 F.2d at 222 n.18. Thus, *Reynolds* does not conflict with the Fifth Circuit's holding on the nonapplicability of *Batson* because of no governmental action.

In *Fludd v. Dykes*, the Eleventh Circuit did hold that *Batson* applied in civil as well as criminal cases and specifically that the exercise of peremptory challenges by governmental litigants in a civil action were subject to the constraints of *Batson*. The court, in dicta, ruled that the actions of the trial judge supplied the requisite governmental action. 863 F.2d at 828. This discussion is clearly dicta because the court was considering the exercise of peremptory challenges by governmental official litigants. Therefore, the governmental action issue in *Fludd* should have properly been resolved as it was in *Reynolds* on that fact alone.

Therefore, properly understood, these two decisions are distinguishable from the Fifth Circuit's decision here which involves private litigants and do not create a conflict sufficient to warrant the exercise of this Court's jurisdiction.

The state court decisions upon which petitioners rely do not create the necessary conflict sufficient to warrant the exercise of certiorari jurisdiction by this Court because the state courts are not "state courts of last resort" as specified by Rule 10.1(a). In any event, both decisions are plainly distinguishable. *Cornett* was based

exclusively on the Florida constitution, involved the exercise of peremptory challenges by a governmental litigant, the City of Miami, and did not analyze the governmental action issue. *Holley* was based on the California constitution and contained no state action analysis. Thus, these two decisions clearly do not supply the requisite conflict on a federal question sufficient to warrant the exercise of this Court's certiorari jurisdiction.

Finally, to the extent that the *Fludd v. Dykes* dicta on the state action issue conflicts with the Fifth Circuit's decision here, Dixie respectfully suggests that the Court should allow this issue to reach decision in other courts of appeals so that the Court will have the benefit of more than two analyses of this issue.

III. The Fifth Circuit's decision is consistent with this Court's precedents on determining governmental action.

Petitioners argue that the Fifth Circuit's decision misapplied this Court's opinion in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), and is inconsistent with *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961); *Terry v. Adams*, 345 U.S. 461 (1953); and *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970). Pet. 7-12. A careful review of the Fifth Circuit's decision in *Edmondson* and this Court's precedents reveals that *Edmondson* is fully consistent with those precedents.

This Court has stated that generalities cannot control the determination of governmental action, and the outcome of each case depends upon its particular facts and circumstances. *Burton*, 365 U.S. at 722.

In *Edmondson*, 895 F.2d at 221, the Fifth Circuit explicitly acknowledged and applied *Lugar's* following two-part test for identifying state (or governmental) action:

> First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor.

457 U.S. at 937.

The Fifth Circuit concluded that the first part was met because the exercise of peremptory challenges was authorized by federal statute, 28 U.S.C. § 1870. 895 F.2d at 221. However, the Fifth Circuit concluded that there was no state actor causing the deprivation. *Id.*

Petitioners argue that the holding in *Lugar*, that the actions of the state court clerk in approving the writ under the unconstitutional state prejudgment attachment statute, applies to the trial judge here. This is plainly wrong because this Court in *Lugar* noted that its holding was "limited to the particular context of prejudgment attachment." 457 U.S. at 939 n.21. Simply put, the state in *Lugar* created an unconstitutional prejudgment attachment statute and involved a state official in the enforcement process. *Lugar* does not compel a holding that the trial judge here supplies the requisite governmental action to a private party's exercise of peremptory challenges. To do so would be inconsistent with this Court's observations in *Blum v. Yaretsky*, 457 U.S. 991, 1004-05 (1982), that "a State normally can be held responsible for a private decision only when it has exercised coercive

power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed that of the State[ ]" and that "[m]ere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives under the terms of the Fourteenth Amendment." As the en banc Fifth Circuit correctly observed: "The merely ministerial function exercised by the judge in simply permitting the venire members cut by counsel to depart is an action so minimal in nature that one of less significance can scarcely be imagined." 895 F.2d at 221 (footnote omitted).

The Fifth Circuit also noted, 895 F.2d at 222, that it was hard to see how this Court could have reserved judgment, as it purported to do in *Batson*, on the strikes by defense counsel, if the "actor" was the judge. 476 U.S. at 89 n.12.

Burton v. Wilmington Parking Authority is distinguishable on its facts because of the extensive symbiotic relationship there between the private restaurant engaged in racial discrimination and its landlord, the state parking authority, and the fact that the state parking authority was receiving benefits from the restaurant. *See NCAA v. Tarkanian*, 488 U.S. 179, 196 n.16 (1988) (distinguishing *Burton* based on the interdependence between the restaurant and the parking authority.)

Terry v. Adams, 345 U.S. 461, 469 (1953), is distinguishable because the Jaybird primary had become an integral and, indeed, the only effective part of the election process in a Texas county. As correctly observed by the Fifth Circuit, "The traditional roles of private counsel

and the state have remained discrete in this case." 895 F.2d at 222.

Likewise, *Adickes* does not support a finding of state action. *Adickes* is distinguishable on its facts because there both state law and custom coerced and encouraged racial segregation in the use of public restaurants. Here, there is no comparable federal action coercing or significantly encouraging the exercise of racially discriminatory peremptory challenges by private parties in civil cases in federal court. Nor is there any record support for petitioners' argument that there was an "understanding" between Dixie and the district court that prospective black jurors would be excused. Pet. 11.

As the Fifth Circuit also correctly noted, 895 F.2d at 222, the actions of private counsel cannot supply the requisite state action. In *Polk County v. Dodson*, 454 U.S. 312, 325 (1981), this Court held that a public defender, paid by the state, is not a state actor when performing a lawyer's traditional function as counsel to a defendant in a criminal proceeding.

In short, petitioners' argument is to create a test of implicit lurking, Pet. 12, for identifying governmental action. Such a test would admit of no readily perceivable limitations and is not supported by the precedents of this Court.

CONCLUSION

The Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit should be denied.

Respectfully submitted,

DIXIE INSURANCE COMPANY,
Respondent

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